No. 21,130

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

TONKIN CORPORATION OF CALIFORNIA, dba SEVEN-UP BOTTLING COMPANY OF SACRAMENTO,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR REHEARING.

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Petitioner, Tonkin Corporation of California, D/B/A Seven Up Bottling Company of Sacramento, respectfully petitions the Court to grant a rehearing in this cause with respect to the Court's decision of 29 March, 1968, on the basis of the following considerations and grounds:

A. The Court has held that the Petitioner Employer committed violations of the Act because it locked out its employees on 1 April, 1963, for the purpose, *inter alia,* of preventing its employees from "freely determining their bargaining representative and otherwise keeping the Union subservient to it as a bargaining representative." (Slip Opinion, p. 6).

B. Assuming, *arguendo,* that there is evidence to support this finding, the decision overlooks the following critical and undisputed facts:

1. No issue of representation or cognizable question regarding choice of bargaining representative was ever presented at any time pertinent to the activity under review:

(a) The context of the matter was a bargaining situation, not a representation proceeding;

(b) The Union was and had been the acknowledged bargaining representative of the employees for several years;

(c) No claim of representation, claim of majority, demand for recognition or offer of showing was *ever* made by the Teamsters; a Petition for an election was filed with the Board on the day after the commission of the alleged violations and only came to the Employer's attention some four days later. The fact that a number of cards were signed is not evidence to the contrary. This was brought out for the first time at the hearing; the cards were never placed in evidence, and there is nothing to indicate whether they purported to authorize representation or merely an election.

2. The Employer was at no time under any duty to recognize or bargain with the Teamsters.[1]

3. The Employer was at all times under a mandatory obligation to recognize and bargain with the Union until it had been rejected or replaced pursuant to the majority vote of its employees in a manner consonant with the provisions of the Act, none of which here obtained.

4. The Employer was perfectly entitled, under the authorities cited, to express a preference as between two competing unions, or point out to its employees the relative advantages and disadvantages of membership in either.

5. The Employer, under the authorities cited, was perfectly entitled to prefer dealing with the Union and to seek agreement with it while it continued to be the bargaining representative of its employees.

6. The employer was perfectly entitled to resort to the lockout in order to secure agreement or to enforce its legitimate aims:

(a) To hold the Union to the admitted bargain previously struck, particularly when it was apparent that the Union's officers were attempting to persuade the membership to renege on it;

(b) To require the execution of a written contract embodying the terms of the oral agreement already concluded.[2]

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[1]The Trial Examiner's decision (confirmed by the Board), held as follows: "Although in late March, the Respondent was aware that the employees were showing some interest in the Teamsters, no claim of representative status was made by that organization until April 2. Thus it appears that Respondent was wholly free, at least until then, to deal with the Union and to reach whatever agreement with the Union that it could." [Trial Examiner's Decision, p. 7, line 60; p. 8, lines 1-5].

[2]Section 8(d) of the Act provides, in pertinent part, as follows: "For the purposes of this Section, to bargain collectively is the performance of the mutual obligation of the employer

(c) To encourage the preservation of a stable and harmonious bargaining relationship of several years' standing.

C. The fact that the contract, concluded with the Union, operated in bar of further Teamster efforts or that this result may have been desired or even formed a part of the Employer's purpose was not, under the circumstances, illegal:

1. It is perfectly proper for an employer to desire to preserve a legitimate bargaining relationship of long standing and to promote its continuance by *legal* means.

2. Every action of the Employer here, through the critical events of 1 April, was perfectly legal in and of itself.

3. The foreclosure of a question of choice, if any there was, resulted solely from the failure of the Teamsters to take timely and appropriate action. The employer cannot be penalized for Teamster tardiness or charged with knowledge of circumstances of which it was never made aware. The elements of the instant situation are inherent in every bargaining situation where employees may have unmanifested reservations about their bargaining representative.

4. The employer here was guilty of foresight, at most, and of having moved, by legal means, to maintain the stability of its bargaining relationship. The Board's decision, here confirmed, converts legal means and legitimate purpose into illegal conduct solely through the arbitrary and mistaken application of hindsight.

5. The employer's conduct was not inimical to the bargaining process; it was the conduct of the Union's

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and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, *and the execution of a written contract incorporating any agreement reached if requested by either party . . .*" (Emphasis added).

officers which had as its admitted purpose, later revealed, the frustration of that process and repudiation of the agreement on which the parties had shaken hands.

D. The fact that the Union may have been "subservient" is without legal significance and, therefore, not pertinent:

1. The Union was held by the Board to be a labor organization within the meaning of the Act.

2. The Board found that the Union was at no time dominated by the employer or the recipient of unlawful assistance.

3. Legally, the Union stood on the same footing as the Teamsters, and the same considerations would, of necessity, apply had their situations been reversed. The fact that the Union may have been easier to deal with is not, therefore, a ground for penalizing the employer.

E. The decision is contrary to the specific mandate and to the stated policy of the Act:

1. It condones, and even rewards, the illegal conduct of the Union's officers in violating their fiduciary duties to the Union and its membership.[3]

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[3]Section 501(a) of the Landrum-Griffin Act, 27 U.S.C., Section 501(a), provides, in pertinent part: "The officers . . . of a labor organization occupy positions of trust in relation to such organization and its members as a group. It is, therefore, the duty of each such person, . . . *to refrain from dealing with such organization as an adverse party or in behalf of an adverse party in any manner connected with his duties.* . . ." (Emphasis added). See also *Johnson v. Nelson,* 325 F. 2d 646 (8th Circuit-1963), in which the reviewing Court said of this statute, "Thus it plainly appears that the statute is broad in its reach. Officers and other Union representatives may not act adversely to their organization or to the members as a group, or acquire a personal interest which is contrary to the interests of the organization. Being trustees, the officers must subvert their own personal interests to the lawful mandates and orders of the organization." (At p. 650).

2. It stigmatizes and punishes the Employer for observing and pursuing its duty to bargain in good faith, when, had it acted otherwise than it did, it would have been guilty of unlawfully refusing to bargain with the acknowledged representative of its employees, and of contributing unlawful assistance to the Teamsters. It must be borne in mind that at the time of the events in question, the Employer had no actual notice of any Teamster organizing activity (which had commenced only the preceding day!), and had been presented with no demand by the Teamsters for recognition and had been tendered no evidence that either the Teamsters or anyone else, other than the Union with which it had been properly bargaining, represented the majority of its employees for collective bargaining purposes. Under these circumstances, for the Employer to have declined to bargain with the Union or to have extended any preference whatever to the Teamsters, would have constituted the most egregious violation of the Act under a host of the Board's own cases.

We earnestly believe the Court will conclude, upon re-examination, that the decision cannot be supported since, in proper perspective, it contravenes the policy and purpose of the Act, the cases which interpret it, and the pertinent doctrine of the Board itself. For these reasons, we urge that this Petition be granted.

Respectfully submitted,

HODGE, JACKSON, KUMLER & CROSKEY,
By MORTON B. JACKSON,
Attorneys for Petitioner.

Certificate.

The undersigned certifies that he has examined the provisions of Rules 18, 19 and 23, of this Court and that, in his opinion, the tendered Petition conforms to all requirements.

He also certifies that the foregoing Petition for Rehearing is presented in good faith, that it is, in his opinion, well taken and is not interposed for purposes of delay.

MORTON B. JACKSON